

Supreme Court, U. S.
FILED

OCT 23 1978

MICHAEL NEDAK, JR., CLERK

78 - 552

IN THE
Supreme Court of The United States
OCTOBER TERM, 1978

[REDACTED]

SAM BUILTA,

v.

Petitioner,

GENERAL ELECTRIC CREDIT CORPORATION,
Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

MARTIN D. BEIRNE
RUSSELL H. McMAINS
800 Bank of the
Southwest Bldg.
Houston, Texas 77002
(713) 651-5151

*Attorneys for Respondent
General Electric
Credit Corp.*

Of Counsel:
FULBRIGHT & JAWORSKI

INDEX OF AUTHORITIES

Cases	<u>PAGE</u>
Dunn & Bradstreet, Inc. v. O'Neil, 456 S.W.2d 896 (Tex. 1970)	2
Fitzjarrald v. Panhandle Pub. Co., 149 Tex. 87, 228 S.W.2d 499 (1950)	3
Lucas v. Firestone Tire & Rubber Co., 458 F.2d 495 (5th Cir. 1972)	3
Murtagh v. Univ. Computing Co., 490 F.2d 810 (5th Cir. 1974)	3

Statutes and Rules	
Fed. R. Civ. P. 52(a)	3
U.S. Sup. Ct. Rule 40, § 3 28 U.S.C.A.	1
28 U.S.C.A., § 1912	4

IN THE
Supreme Court of The United States
OCTOBER TERM, 1978

No. 78-522

SAM BUILTA,
Petitioner,
v.
GENERAL ELECTRIC CREDIT CORPORATION,
Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

TO THE HONORABLE UNITED STATES SUPREME COURT:

Now COMES respondent, General Electric Credit Corporation, and files this its brief in opposition to the petition for writ of certiorari and pursuant to U.S. Sup. Ct. Rule 40, § 3, 28 U.S.C.A. accepts petitioner's statement of the opinions below, jurisdiction, questions presented for review and the admitted absence of constitutional and statutory provisions that are involved herein.

STATEMENT OF THE CASE

Respondent must correct the assertion at page 6 of the petition that "the case" was not tried on the issue of "con-

ditional privilege." To the contrary, the record below establishes that the alternative defense of qualified privilege was contained in paragraph VIII of respondent's original answer (R. 721), was expressly stated in the pretrial order which was signed by counsel for all parties and approved by the Court and filed (R. 750-59), and was further urged in respondent's two motions for directed verdict (R. 522-25; 623-25).

ARGUMENT

THE DECISION BELOW WAS BASED UPON THE ISSUES OF STATE LAW THAT WERE CORRECTLY DECIDED.

Petitioner has already noted the absence of any questions of federal significance in the announcement that no Constitutional or federal statutory provisions are involved in this cause. Petitioner further concedes, at page 14, that this case is of no great importance or interest to the public at large. The sole question presented in the petition for writ of certiorari involves the evidentiary support for the trial court's finding of qualified privilege that mandated rendition of judgment for respondent. The United States Court of Appeals for the Fifth Circuit properly affirmed the trial court's judgment on certificate because the dispositive State question of qualified privilege was properly determined by the trial court.

The trial court properly concluded that under Texas law, qualified privilege is a defense to an action for libel or slander that requires proof of actual malice in order for the plaintiff to prevail. *Dunn & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896 (Tex. 1970). The jury refused to find actual malice in response to the questions submitted to it and accordingly, judgment was properly rendered for the defendant, General Electric Credit Corporation.

Whether the question of the existence of a qualified privilege involves a question of law or of fact is absolutely immaterial to the disposition of this petition. If such issue is a question of law, as suggested in *Fitzjarrald v. Panhandle Pub. Co.*, 149 Tex. 87, 228 S.W.2d 499, 505 (1950), then appellate courts will consistently defer to the trial judge's presumed superior knowledge and determination of questions of local (Texas) law. *Lucas v. Firestone Tire & Rubber Co.*, 458 F.2d 495 (5th Cir. 1972). Alternatively, if the question of qualified privilege has any factual components, then findings on such issue, having not been submitted to the jury, would be deemed found in support of the judgment rendered by the trial court in favor of respondent, General Electric Credit Corporation. This is conceded by petitioner in his motion for rehearing that appears at page 53 of the appendix to the petition for writ of certiorari. Significantly, the clearly erroneous standard of Fed. R. Civ. P. 52(a) would then be applicable to such deemed findings. *Murtaugh v. Univ. Computing Co.*, 490 F.2d 810 (5th Cir. 1974). Thus, petitioner has even failed to attack the trial court's judgment on the correct standard since there is no suggestion, either here or in any of the earlier briefs filed by petitioner, that the trial court's finding of qualified privilege is clearly erroneous.

Actually, the existence of the qualified privilege in the instant case is overwhelmingly supported by the evidence and the only argument that has ever been asserted to the contrary by petitioner is some suggestion that because of the separateness of two corporate entities, they are deprived of the defense of qualified privilege. Texas law simply offers no support whatsoever for petitioner's untenable argument.

CONCLUSION

Because the petitioner has admitted that no substantial federal question or question of public importance justifies

his petitioning this Court for review, respondent feels that the petition should be summarily dismissed as frivolous and that the costs of printing of this brief in opposition should be taxed against petitioner as damages pursuant to 28 U.S.C.A., § 1912 (1959).

Respectfully submitted,

By

MARTIN D. BEIRNE
RUSSELL H. McMAINS

Of Counsel:

FULBRIGHT & JAWORSKI

Attorneys for Respondent
General Electric
Credit Corp.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari have been mailed to counsel for petitioner, Messrs. J. G. Hornberger and J. G. Hornberger, Jr., 915 Victoria Street, Laredo, Texas 78040, by certified mail, return receipt requested, on this day of October, 1978.

.....
RUSSELL H. McMAINS